In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 23

CLINTON E. JENCKS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

This memorandum is filed at the Court's request in response to questions raised at the oral argument.

1. *What disposition of this case should be made by the Court if it concludes that the trial court erred in denying one or more of petitioner's several motions for production of F. B. I. reports for inspection by the court at the trial or at the hearing on the motion for a new trial?*

In the event that this Court concludes that it was error for the trial court to overrule one or more of petitioner's several motions for production of F. B. I. reports, it does not follow that the proper disposition of the case would be to remand it to the trial court with directions to grant a new trial. Whether a new

trial is required would depend upon the contents of the reports. If the reports in fact contradict in material respects the witnesses' trial testimony or exculpate the petitioner, clearly a new trial is required. If, however, the reports do not contain such contradictory or exculpatory material, no possible prejudice could have resulted from the trial court's denials of the petitioner's several motions to produce.

We believe that the trial court, rather than this Court, is the appropriate tribunal to examine the F. B. I. reports and to determine, in the light of such examination, whether a new trial should be had. The trial court, which has heard and seen all the witnesses and has had the full trial unfold before it, is in the best position to appraise the contents of the F. B. I. reports and their bearing on the trial testimony. Decisions on evidentiary matters are normally the function of trial courts, and in comparable instances this Court has declined itself to make a *de novo* evidentiary inquiry but instead has adopted the practice of remanding to the trial forum for such purpose. See, *e. g., Remmer* v. *United States,* 347 U. S. 227; *Communist Party* v. *Subversive Activities Control Board,* 351 U. S. 115; cf. *United States* v. *Johnson,* 327 U. S. 106. To create an exception for this particular case would establish a troublesome and potentially mischievous precedent. It is probable that the Court's ruling would regularly be pressed, in all types of criminal cases, as authority for appellate courts to pass initially on matters, such as are here involved, which are normally considered appropriate for remand to trial courts.

Nevertheless, if the Court should consider, in view of its supervisory responsibility over the lower federal courts (*Calvaresi* v. *United States*, 348 U. S. 961), that it would prefer to inspect the reports for itself, without remanding to the trial court for that purpose, the Government is filing with the Clerk of this Court, under seal, photostatic copies of the F. B. I. reports requested by the petitioner, so that the Court may make the inquiry for itself, if it is so inclined. Cf. *United States* v. *H. J. K. Theatres Corp. et al.*, decided by the Second Circuit on August 20, 1956 (grand jury minutes, which had not been inspected by the trial court, were inspected by the court of appeals).

2. *Does the Court's action in Mesarosh* v. *United States, decided October 10, 1956, require this Court to order a new trial in the present case?*

As we understand the basic question, it is:—does the fact that an important government witness has under oath recanted his testimony *in itself* cast sufficient doubt on the conviction to call for a new trial and impel this Court to so order? The answer, as given by both federal and state courts[1] over the years, has consistently and emphatically been that a recantation imposes no such duty, but on the contrary requires the trial court to undertake an inquiry into the probable truth or falsity of the recantation. *United States* v. *Troche*, 213 F. 2d, 401, 403 (C. A. 2); *Nilva* v. *United States*, 212 F. 2d 115, 123–124 (C. A. 8), certiorari denied, 348 U. S. 825; *Harrison* v. *United*

[1] The state cases are collected in 33 A. L. R. 550; 74 A. L. R. 757; and 158 A. L. R. 1062

States, 191 F. 2d 874 (C. A. 5);[2] *Gordon* v. *United States,* 178 F. 2d 896 (C. A. 6), certiorari denied, 339 U. S. 935; *Perry* v. *United States,* 39 F. 2d 52, 54–55 (C. A. 5), certiorari denied sub nom. *Capo* v. *United States,* 281 U. S. 769; *Larrison* v. *United States,* 24 F. 2d 82, 87–88 (C. A. 7); *United States* v. *Johnson,* 142 F. 2d 588, 591 (C. A. 7), petition for certiorari dismissed, 323 U. S. 806; *United States* v. *Johnson,* 149 F. 2d 31, 44 (C. A. 7), reversed on other grounds, 327 U. S. 106; *Harrison* v. *United States,* 7 F. 2d 259, 262 (C. A. 2); *United States* v. *Flynn,* 130 F. Supp 412, 421–422 (S. D. N. Y.). And see *Hysler* v. *Florida,* 315 U. S. 411, 413, where the Court noted that failure of a state to give effect to a recantation did not even raise an issue under the due process clause.

The reason for the rejection of any such absolute rule as has been suggested was succintly stated by Judge Seabury in the leading New York case of *People* v. *Shilitano,* 218 N. Y. 161, 169, involving the recantation of three witnesses in a murder trial. In answering the question whether "recantation by wit-

[2] Language by the Fifth Circuit in *Martin* v. *United States,* 17 F. 2d 973, 976 (C. A. 5), certiorari denied, 275 U. S. 527, which suggests a broad rule must be considered in the light of its later opinions cited in the text.

[3] As stated in the *Larrison* case, *supra,* the rule is that when a trial judge is confronted with a recantation by an important Government witness, he should, before granting a motion for a new trial on the basis of the recantation, be "reasonably well satisfied," first, that the recanting witness' *trial* testimony was in fact false; second, that "without it the jury *might* have reached a different conclusion"; and, third, that "the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after the trial" (24 F. 2d at 87–88).

nesses called on behalf of the People necessarily entitled the defendant to a new trial", the opinion states:

> The question must be answered in the negative, otherwise the power to grant a convicted defendant a new trial rests not with the court but with the witnesses who testified against him upon the trial.

As Judge Seabury suggests, to adopt the proposed rule would be to enable and encourage defendants to join with prosecution witnesses in automatically setting aside a conviction by producing a "recantation". The dangers and potentialities implicit in such a situation need not be elaborated. See the Appendix to the Government's main brief, pp. 64–71.

The full implications of such a holding were so well stated by Judge Cardozo in his concurring opinion in the same case (218 N. Y. at p. 180) that we quote the initial part of his concurring opinion in full:

> Three witnesses for the prosecution have stated under oath to the trial judge that their testimony upon the trial was false. It became his duty to say whether they were conscience-stricken penitents, or criminal conspirators to defeat the ends of justice. He has held them to be conspirators. Unless we can say that he was wrong, and that they were not conspirators, but penitents, we have no right to reverse his order. But I do not see how we can say that he was wrong. I do not understand that even the judges who think this judgment should be reversed, assert that he was wrong. Their view is that, with such a conflict of oaths, he should have abandoned

> the search for truth, and turned it over to a jury. That would have been an easy avenue of escape from a solemn responsibility, but I cannot satisfy myself that along that avenue lay the path of duty. I think it was the duty of the trial judge to try the facts, and determine as best he could where the likelihood of truth lay. That is the very reason why the statute authorizes him to compel the personal appearance of the affiants before him (Code Crim. Pro. § 465, subd. 7; *People* v. *Shilitano,* 215 N. Y. 715). I do not mean that to justify a new trial, he must have been convinced—firmly or with a sense of certainty convinced—that the first story of the witnesses was false and that their new story was true. He might act upon a reasonable probability. But if, on the contrary, he was *convinced* that the second tale was false, that a criminal league had been formed to set at naught the verdict of the jury and the judgment of the court, his duty was clearly marked (*People* v. *Tallmadge,* 114 Cal. 427; *Parker* v. *Hardy,* 24 Pick. 246, 249). He was not at liberty to shift upon the shoulders of another jury his own responsibility. That would have been to make the conspiracy triumph. He was charged with a responsibility to seek the truth himself. [Emphasis added.]

In the instant case, the trial judge, after full hearing, found that Matusow's testimony at the trial was true and his recantation false (H. 818–820). He stated that he was "thoroughly convinced" that the recantation was a deliberate scheme to obstruct justice (H. 820). His decision on the motion for new

trial is entitled to the greatest of weight and should not be overturned unless it is plainly arbitrary and without any support. *United States* v. *Johnson,* 327 U. S. 106. Certainly, the materials collected in the opinion of the Court of Appeals on the new trial motion (H. 833) and in our main brief (see the Statement, pp. 3–14; Appendix, pp. 64–71) show that the trial judge's determination is not so defective that it must be quashed.

Further, we think it appropriate to point out that the petition for certiorari did not seek review of the findings of the trial court denying the motion for a new trial. This is not to say that this Court under its general supervisory powers may not now review those findings, but in the interest of orderly proceedings we submit that a question not raised, briefed, or argued should not be made the basis for reversal except in the most exceptional circumstances.

The situation in *Mesarosh* was wholly different. There had been no hearing before the trial judge, and no such findings had been made as here. The Court apparently concluded, on the basis of the contents of the Solicitor General's motion and his oral presentation, that on remand the district judge could not reasonably come to any conclusion other than that *Mazzei* had more probably than not testified falsely *at the trial,* and that his testimony was important to all of those petitioners. As a result, the Court decided, we believe, that a remand for consideration by the trial court would be useless. In the instant case, there is no such basis for the Court to determine, in the presence posture of the litigation, that Matusow lied *at the trial.* The District Court has

held a full hearing on that precise issue and has decided otherwise. As noted above, his findings are not arbitrary and therefore the Court should not itself order a new trial on the ground of Matusow's recantation, as it did on the basis of the different facts and circumstances in *Mesarosh*. We think the precedent would prove to be an unhappy one. We also do not believe, in view of the long-established and consistent line of authority discussed *supra*, that the Court intended to hold in *Mesarosh* that the recantation of an important trial witness, or proof of a later perjury by such a witness, is of itself enough to compel the granting of a new trial. See also *United States* v. *Johnson*, 327 U. S. 106.

To be sure, the trial judge here found that Matusow's recantation was false, and that his testimony at the post-trial hearing was perjurious. But this finding does not in itself require the conclusion that petitioner is entitled to a new trial. Whenever a recantation is made, it is either true or false. If true, the witness testified falsely at the trial. If false, the witness is testifying falsely in his recantation. In other words, in every case of recantation the witness must have testified falsely at one stage or the other. Hence, to characterize him as a "perjurer" and conclude that a new trial is therefore required would mean a new trial in *every* case where a recantation is proffered. And, as has been noted, the established rule is precisely to the contrary. A recantation marks the beginning, not the end, of the judicial inquiry into the necessity for a new trial.

3. *In the event this Court decides that the trial judge erred in its rulings on production of F. B. I.*

reports, should the Court decide the remaining questions relating to the adequacy of the charge?

By reason of the view which we hold that the proper disposition of this case, if there was error with respect to the reports, is remand for further consideration by the trial judge, we believe that the remaining questions should be decided. If the trial judge determines that a new trial is not warranted, the case will not be disposed of without decision on those questions. If he should decide that a new trial is warranted, there will have to be another charge on the retrial. The Court may therefore wish to give guidance, at this stage, on the issues relating to the charge, in order to avoid possible further appeals and delays. Such guidance will also be useful at other trials in which questions comparable to those raised here may be presented.

Respectfully submitted,

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